IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-0549

IN THE MATTER OF	the Tax Administration Act 1994, the Goods and Services Tax Act 1985 and the Receiverships Act 1993.
BETWEEN	MICHAEL PETER STIASSNEY AND GRANT ROBERT GRAHAM First Plaintiffs
AND	FORESTRY CORPORATION OF NEW ZEALAND LIMITED (IN RECEIVERSHIP) Second Plaintiff
AND	CITIC NEW ZEALAND LIMITED (BVI) (IN RECEIVERSHIP) Third Plaintiff
AND	CNI FOREST NOMINEES LIMITED Fourth Plaintiff
AND	BANK OF NEW ZEALAND Fifth Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 31 August 2009 and 17 May 2010

Counsel: R Scoular for First, Second and Third Plaintiffs
R G Simpson and D Simcock for Fourth Plaintiff
J McKay and J Burt for Fifth Plaintiff
D J Goddard QC and H Ebersohn for Defendant

Judgment: 4 November 2010

JUDGMENT OF ALLAN J.

This judgment was delivered by
The Hon. Justice Allan
at 3.30 pm on Thursday 04 November 2010
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

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Introduction

[1] This proceeding raises issues concerning the personal liability of receivers for GST, the scope and application of s 95 of the Personal Property Securities Act 1999 (PPSA) and the developing law relating to the recovery of monies paid by reason of a mistake of law or fact.

[2] Mr Simpson describes the case as an amalgam of two related claims:

a) A tax challenge under the Tax Administration Act 1994; and

b) An action for the return of money paid under a mistake by the first plaintiffs, in their capacity as receivers.

[3] The Commissioner says that the proceeding is fatally flawed and that the plaintiffs cannot succeed at trial. Mr Goddard seeks an order striking out the proceeding in its entirety.

The parties

[4] The first plaintiffs (the receivers) are the receivers of the second plaintiff (FCNZ) and the third plaintiff (CITIC). Since 1996 FCNZ and CITIC have traded in partnership as the Central North Island Forest Partnership (CNIFP). In this proceeding they sue as a firm. The fourth and fifth plaintiffs are security trustees for syndicates of banks which provided funding to the CNIFP.

Factual background

[5] The CNIFP was established in 1996. Between that time and December 2003 it acquired, owned and operated seven forestry businesses and assets previously owned and operated by FCNZ. Following completion of the acquisition, the CNIFP assets were held by FCNZ and CITIC in partnership; although initially there were other participants, these two entities ultimately each became the holders of a one half share in the partnership. By virtue of certain security documents, it was agreed

between the parties that all sums recovered by the fourth and fifth plaintiffs from assets subject to the securities would be applied in the following order:

a) First, towards payment of all costs, losses, liabilities, expenses, outgoings and remuneration of any receiver of FCNZ and/or CITIC appointed by the BNZ;

b) Second, towards the payment of the costs, charges, losses, expenses and liabilities of the BNZ as senior security trustee;

c) Third, towards the payment of senior debt (in respect of which the BNZ was the security trustee);

d) Fourth, towards the payment of junior debt (in respect of which CNI Forest Nominees Limited was the security trustee).

[6] On 26 February 2001, the BNZ appointed the receivers to act in respect of the assets of FCNZ and CITIC charged under the relevant security documents. On that same day the receivers notified the Commissioner of their appointment. By letter also dated 26 February 2001, FCNZ and CITIC each appointed one of the receivers as its representative on the management board of the CNIFP. Accordingly, from that date the first plaintiff receivers controlled the management board of the CNIFP and therefore the CNIFP itself.

[7] On 10 October 2003, the CNIFP entered into a sale and purchase agreement under which it agreed to sell its assets for approximately US$621 million plus GST of approximately NZ$127.5 million. In their capacity as the partners of the CNIFP, FCNZ and CITIC were named as vendors in the sale and purchase agreement. The proceeds of sale were insufficient to repay in full the secured amounts and the GST payable to the Commissioner on the sale. The CNIFP, FCNZ and CITIC were, therefore, all insolvent.

[8] The sale of the forest assets was settled in December 2003 when the CNIFP received the proceeds of sale of together with the agreed GST sum.

[9] On 19 December 2003, Fletcher Challenge Forest Finance Limited (Fletcher Finance) - the lender under the second-ranking securities held by CNI Forest Nominees as security trustee - forwarded a letter to the Commissioner, the receivers and the BNZ claiming that by its second ranking security it had a superior claim to the GST component of the sale proceeds which ranked ahead of the Commissioner's unsecured claim for GST. It further notified the Commissioner that Fletcher Finance opposed any payment of GST to the Commissioner ahead of the repayment of the amount owing under its own facility.

[10] On 29 January 2004 the BNZ issued a similar letter to the Commissioner and the receivers in its capacity as security trustee and agent of the first ranking banking syndicate that had provided funding facilities to FCNZ and CITIC.

[11] The case for the receivers emphasises the difficult position in which they found themselves. On the one hand, if they paid the GST component of the sale proceeds to the Commissioner, they ran the risk of being exposed to a claim from the BNZ and CNI Forest Nominees who claimed a prior entitlement to the funds under their respective securities. On the other hand, if they paid the GST component of the sale proceeds to the BNZ and CNI Forest Nominees, they would expose themselves to a claim from the Commissioner for unpaid GST and penalties if indeed they were personally liable.

[12] The receivers considered placing the amount of the GST in a stakeholder's account while seeking a binding ruling from the Commissioner pursuant to s 91E of the Tax Administration Act 1994 or, alternatively, Court directions by way of interpleader proceedings. But there were practical difficulties in the way of that approach:

a) If they were ultimately found to be liable the receivers would be exposed, in addition, to penalties and interest on the unpaid GST pursuant to ss 120D and 139B of the Tax Administration Act; that additional liability might amount to more than $20 million simply by reason of the passage of time before a result could be obtained.

b) It ordinarily takes at least six months to obtain a binding ruling from the Commissioner.

c) A ruling from the Commissioner that the receivers were personally liable for GST would not bind the BNZ and CNI Forest Nominees in any event.

d) The only procedural avenue open to the receivers through the Court was by way of tax challenge proceedings under the Tax Administration Act - such proceedings ordinarily take two years to complete, excluding appeals.

[13] The receivers took legal advice. Having done so, they considered that there was a significant risk that they were indeed personally liable for the total amount of the GST arising on the sale. Accordingly, they took the following steps:

a) On 29 January 2004, they drew a cheque in favour of Inland Revenue in the sum of $123,416,346.20 on the receivers' account for the Central North Island Forestry Partnership (the CNIFP was not of course in receivership but the account was styled in that fashion so as to indicate that the receivers controlled it).

b) On the same day they filed a GST return.

c) In March 2004, the receivers filed a Notice of Proposed Adjustment (NOPA) pursuant to s 89DA of the Tax Administration Act in respect of the GST paid to the Commissioner on the sale.

d) In 2008, the plaintiffs commenced this proceeding in which they challenged the receivers' self-assessment for their personal liability for the GST amount and also sued for recovery of the GST payment on the basis that it was paid under a mistake.

[14] On 3 May 2004, the Commissioner rejected the NOPA by issuing a Notice of Response (NOR) pursuant to s 89G of the Tax Administration Act. The grounds for rejection were that:

a) The Commissioner was a preferential creditor of the CNIFP and therefore of FCNZ and CITIC for the GST in respect of the sale and as such had priority over the claims of secured creditors;

b) The receivers were specified agents by virtue of s 58 of the Goods and Services Tax Act 1985 (the Act) and therefore had a personal liability to pay or account to the Commissioner for GST in respect of the sale.

[15] Later, on 10 December 2007, the Commissioner wrote to the receivers maintaining his earlier view and indicating that he would defend any proceedings which the receivers might commence.

Grounds for strike-out application

[16] The Commissioner contends that the statement of claim does not disclose any reasonably arguable cause of action and is frivolous and vexatious; accordingly it should be struck out.

[17] The Commissioner's application is made on several distinct grounds:

a) Contrary to their present contention (but consistently with the basis upon which they paid the GST in the first place) the receivers are in law personally liable to pay to the Commissioner the amount of the GST concerned. It is common ground that if this be so the plaintiffs cannot succeed.

b) The GST payment was made by the CNIFP from its own funds by way of negotiable instrument and accordingly the Commissioner has priority to the amount of the payment by virtue of the provisions of s 95 of the PPSA.

c) The CNIFP was liable to pay the GST amount to the Commissioner and having paid that amount there is no basis upon which the CNIFP or the receivers can seek to recover the GST amount from the Commissioner in reliance upon the law relating to payments made under a mistake of fact or law; there can be no right of recovery when the payment is made to discharge a debt actually owing by the payer to the payee.

d) As a pleading point, only CNI Forest Nominees Limited and the BNZ are entitled to maintain a claim to the GST amount; the remaining plaintiffs have no entitlement greater than that of the Commissioner to the sum concerned.

[18] The Commissioner's application therefore raises four broad issues for determination:

a) Whether the receivers were personally liable for payment of the GST.

b) If they were not, whether s 95 of the PPSA nonetheless constitutes a barrier to the plaintiffs' claim.

c) Whether any one or more of the plaintiffs is entitled to maintain a claim based upon the contention that the GST was paid to the Commissioner by reason of a mistake of fact or law.

d) Residual questions as to the entitlement of individual plaintiffs to sue.

Strike-out principles

[19] There is no dispute as to the proper approach to an application to strike out a proceeding. The Commissioner must show that the plaintiffs have no tenable argument on the basis of which they might succeed at trial. A useful summary of the

relevant principles appears in the judgment of Andrews J in *Kerikeri Village Trust v Nicholas*[1] at [7]-[11]:

> [7] The principles applying to an application to strike out pleadings are well-established:[2]
>
> a) The Court proceeds on the assumption that the facts pleaded in the statement of claim are true.
>
> b) Before the Court may strike out proceedings the causes of action must be so clearly untenable they cannot possibly succeed.
>
> c) The jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material before it.
>
> d) The fact that applications raise difficult questions of law and require extensive argument does not exclude jurisdiction.
>
> [8] Although exercising caution, the Courts have struck out claims pleading novel duties of care such as is alleged, in the present case, to be owed by the Council to the Trust. In particular, the Courts have struck out claims against public regulatory bodies where novel duties of care are alleged.[3]
>
> [9] In its recent judgment in *Couch v Attorney-General*[4] the Supreme Court considered an application to strike out a proceeding against the Probation Service alleging a novel cause of action. In their minority judgment Elias CJ and Anderson J observed at [2] that:
>
> > … Whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care is the question before the Court. If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.
> >
> > [Original emphasis.]
>
> [10] *Couch* therefore reaffirms the need for caution in exercising the jurisdiction to strike out a pleading alleging a novel cause of action.
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> [11] There are, however, competing considerations, as noted by the Court of Appeal in *Attorney-General v Body Corporate 200200* (the *Sacramento* judgment)[5] at [51]:

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1 *Kerikeri Village Trust v Nicholas* HC Auckland CIV-2006-404-5110, 27 November 2008.

2 See *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.

3 See, for example, *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) and *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

4 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC).

5 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA).

> On the one hand, the Courts should not lightly deny plaintiffs the opportunity to proceed to trial on novel issues of law. Moreover, a trial will present a more favourable forum to assess the issues involved in establishing a duty of care. On the other hand, however, defendants ought not to be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

[20] To the same general effect is the judgment of the Court of Appeal in *Queenstown Lakes District Council v Charterhall Trustees Ltd*:[6]

> [15] The principles applicable on a strike-out application under r 186(a) of the High Court Rules were summarised by this Court in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267. They are well-known, and do not require repetition.
>
> [16] However, Mr Hunt drew our attention to the observations of Elias CJ and Anderson J in *Couch v Attorney-General* [2008] 3 NZLR 725 at [32] (SC), where the need for caution in summarily disposing of cases involving allegations of duties of care in novel situations was recognised. Caution is required "both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts". The point is not a new one, and obviously we bear it in mind. But we are also conscious that defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims: see *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [51] (CA) (*Sacramento*).

Were the receivers liable for GST?

[21] At the heart of this aspect of the argument lie the provisions of ss 57 and 58 of the Act. As relevant for present purposes, they provide:

> **57 Unincorporated bodies**
>
> ...
>
> (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
>
> (a) The members of that body shall not themselves be registered or liable to be registered under this Act in relation to the carrying on of that taxable activity; and
>
> (b) Any supply of goods and services made in the course of carrying on that taxable activity shall be deemed for the purposes of this Act to be supplied by that body, and shall be deemed not to be made by any member of that body; ...

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6 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA) at [15]-[16].

(3) Despite this section, a member is jointly and severally liable with other members for all tax payable by the unincorporated body during the taxable periods, or part of taxable periods as the case may be, the person is a member of the body, even if the person is no longer a member of the body.

...

(5) Subject to subsection (6) of this section, where anything is required to be done pursuant to this Act by or on behalf of an unincorporated body, it shall be the joint and several liability of all the members to do any such thing:

Provided that any such thing done by one member shall be sufficient compliance with any such requirement.

...

58 Personal representative, liquidator, receiver

(1) In this section ...

incapacitated person means a registered person who dies, or goes into liquidation or receivership, or becomes bankrupt or incapacitated:

specified agent means a person carrying on any taxable activity in a capacity as personal representative, liquidator, or receiver of an incapacitated person, or otherwise as agent for or on behalf of or in the stead of an incapacitated person.

(1A) ... a person who becomes a specified agent is treated as being a registered person carrying on the taxable activity of the incapacitated person during the agency period, and the incapacitated person is not treated as carrying on the taxable activity during the period.

Receivers' tax liability — The Commissioner's argument

[22] Mr Goddard argues that by virtue of s 58(1A) the receivers are to be treated as registered persons carrying on the taxable activity of the partners, which activities must include participation in the taxable activities of the CNIFP, since the latter is not itself a separate legal entity. Thus, although the receivers are not required to be registered in relation to the taxable activity of the CNIFP,[7] they are nevertheless jointly and severally liable for the partnership's GST liability.[8]

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7 Section 57(2)(a).

8 Section 57(3).

[23] He argues further that although the partners were not registered persons (nor liable to be registered by virtue of s 57(2)), s 58(1A) should nevertheless apply to the instant case; considerations of administrative and commercial expediency which underpin s 57(2) ought not to be used to excuse a receiver from liability under s 58(1A).

[24] In developing his argument, Mr Goddard contends that the taxable activities of the partners must include participation in the taxable activities of the partnership. It is necessary also, on Mr Goddard's argument, to construe the expression "member" in s 57(3) as including a receiver for a member. (The expression "member" includes a member of an unincorporated body.) There is no justification, he maintains, for holding that, although a receiver carrying on a taxable activity on behalf of a company on its own account is personally liable for the GST on supplies made, the same receiver carrying on the same taxable activity on behalf of the same company would not be so liable if the company was carrying on the activity in partnership with another. Such a conclusion would be inconsistent with the purposive approach to ss 57 and 58 adopted in *Commissioner of Inland Revenue v Official Assignee*.[9]

[25] There the Court was concerned with the construction and operation of s 42(2) of the Act. Having concluded that, by virtue of s 57(3) and (5) the Commissioner was entitled to priority under s 42(2)(a), the Court continued:

> [21] The interpretation of s 42 which we have adopted accords with the purpose of the section and avoids a patent anomaly in the legislation. The purpose of the statutory provision is clearly to accord the Commissioner priority in the payment of GST from the assets of a person, body or corporation where that person, body or corporation has become bankrupt, gone into liquidation, or had a receiver appointed, as the case may be. It would be a serious anomaly if the Commissioner were to obtain priority in recovering GST where a receiver had been appointed to a partnership but not where a receiver had not been so appointed, especially as the members of the partnership are jointly and severally liable for that payment and for making that payment by or on behalf of the partnership. In this respect it is to be borne in mind that the legislature has provided for the partnership only to be registered under the Act as a matter of commercial expediency. It would obviously be inconvenient for each of the individual members of a partnership, some of which have many members, to be "registered persons".

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9 *Commissioner of Inland Revenue v Official Assignee* [2000] 2 NZLR 198 (CA) at [21]-[22].

> [22] Furthermore, this approach falls squarely within the principles now accepted for the interpretation of tax statutes. The rules which are applicable are no different from those applicable to any other statute. See *Inland Revenue Commissioners v McGuckian* [1997] 3 All ER 817. Lord Steyn, delivering the main judgment, confirmed at p 824 that the modern purposive approach to statutory construction applies to tax legislation no less than other legislation. The literal interpretation of tax statutes has given way to the purposive approach which requires the Court to consider the context and scheme of the Act as a whole and to have regard to the purpose of the legislative provision. See also *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, per Lord Wilberforce at p 323. See, too, *Hotdip Galvanisers (Christchurch) Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,337 at p 15,341. Nor does s 5(1) of the new Interpretation Act 1999, which requires the meaning of an enactment to be ascertained from its text and in the light of its purpose, exempt tax statutes.

Receivers' tax liability — The Plaintiffs' argument

[26] Mr Simcock, who carried this aspect of the argument for the plaintiffs, emphasised the need to have regard to the overall scheme of the Act.

[27] For administrative convenience, a partnership may register under the Act for GST purposes in respect of a taxable activity carried on by it. In such circumstances the individual partners may not be registered for that same taxable activity.[10] A GST registered partnership is thereafter liable for GST in respect of its taxable activities.[11] But individual partners, although not registered, remain jointly and severally liable along with the partnership for the partnership's GST liabilities.[12]

[28] Section 58(1A) is limited in scope, on the plaintiffs' argument. It is directed at transferring liability from one party (the incapacitated person) to another (the specified agent, which can include a receiver). If the specified agent becomes liable for GST then the incapacitated person is not. Had the plaintiffs been receivers of a partnership then they would have been treated as carrying on the partnership's taxable activity (by selling the CNIFP assets) and the partnership would not have been treated as carrying on that same taxable activity. The receivers would have been liable for GST but the partnership would not.[13]

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10 Section 57(2)(a).
11 Section 23.
12 Section 57(3).
13 Section 58(1A).

[29] Mr Simock points out however, that the plaintiffs were receivers of the partners and not of the partnership. The partners were not incapacitated persons because they were not registered.[14] Accordingly the receivers could not be specified agents for the purposes of s 58(1A) and so cannot be treated as a registered person carrying on the taxable activities of the individual partners.

[30] But the plaintiffs' argument goes further than that.

[31] Mr Simcock contends that, even if it is possible to treat the receivers as carrying on the taxable activities of the partners, the latter were in the circumstances of this case not carrying on any relevant taxable activity at all. The relevant supply arose from the sale by the partnership of the CNIFP assets. That is not a taxable activity of the partners.[15] The CNIFP continues to be liable for the GST amount but s 58(1A) does not deem the receivers to be liable for the CNIFP's GST liability. Section 57(3) imposes joint and several liability on the members of the partnership but the definition of the expression "member" does not include a receiver for a member.

Receivers' tax liability — Discussion

[32] Mr Goddard for the Commissioner identifies three alternative approaches to the construction of the Act, any one of which, if adopted, would lead to a finding that the receivers were personally liable for the GST on the sale of the CNIFP assets.

[33] The first argument is that the sale of the assets amounted to a taxable activity of the partners (as well as the partnership) so the receivers were liable under s 58(1A). In other words, the taxable activities of each of the partners included participation in the taxable activities of the CNIFP, bearing in mind that the partnership is not a separate legal entity. There are problems with this argument.

[34] Section 57(2) provides that where a registered unincorporated body carries on any taxable activity the members of that body shall not themselves be registered, or be liable to be registered, under the Act in relation to the carrying on of that taxable

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14 Section 58(1).

15 Section 57(2)(a).

activity. So for the purposes of the Act the sale of the assets was a taxable activity of the partnership only. The partners become liable, not because the sale is deemed to be their taxable activity, but because s 57(3) imposes joint and several liability for the resultant GST debt.

[35] The Commissioner's argument appears also to conflict with the overall scheme of the Act which imposes primary liability for GST in respect of any taxable activity upon the registered person undertaking that taxable activity. Beyond ss 57 and 58 themselves, examples of that legislative approach are to be found in s 55(7)(a) (dealing with group registration) and s 60 (dealing with agents); see also the judgment of Blanchard J in *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd*.[16] Moreover, the partners were not registered in respect of the relevant taxable activity and so could not fall within the definition of incapacitated person found in s 58(1). It must follow, in my view, that the receivers were not specified agents for the purposes of that subsection and cannot therefore be held liable as such under s 58(1A).

[36] Mr Goddard invites the Court to construe the term "registered person" in s 2(1) of the Act as including a person who carries on a taxable activity and would be liable to be registered in respect of that activity *but for s 57(2)*. In that respect he refers to the legislative direction that the term "registered person" is to be construed in accordance with the definition "unless the context otherwise requires".[17] He argues that the context does require otherwise because s 57(2), enacted only for administrative and commercial expediency, should not take effect substantively so as to excuse a receiver from liability that would otherwise arise under s 58.

[37] I am not satisfied that the context does require an expansive approach to the definition of the term "registered person". Nor do I consider that a purposive approach to the legislation or the overall scheme of the Act requires that outcome. If the receivers are not specified agents, the partners (or members) remain liable by virtue of s 57(3).

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16 *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd* (2004) 21 NZTC 18,397 (CA) at [23].

17 Section 2(1).

[38] An alternative argument advanced for the Commissioner focuses upon the statutory liability of the partners under s 57(3) to pay the GST if the partnership itself does not. The argument is, in effect, that the receivers must be taken to have stepped into the shoes of the individual partners for all taxation purposes.

[39] The answer to this argument lies, in my view, in the need to distinguish between two separate concepts.

[40] The first is the notion of taxable activity and the second is the imposition of joint and several liability upon partners under s 57(3). The term "taxable activity" is defined in s 6 of the Act:

> **6. Meaning of term "taxable activity"**
>
> (1) For the purposes of this Act, the term taxable activity means—
>
> (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
>
> (b) Without limiting the generality of paragraph (a) of this subsection, the activities of any public authority or any local authority.
>
> (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.
>
> …

[41] The sale of the CNIFP assets does not, in my view, constitute a taxable activity attributable to the partners. Of course, through the receivers they may well have engaged in the management of the partnership or "participated" in it — to use Mr Goddard's expression — but that is by no means the same thing as undertaking the taxable activity itself on behalf of the CNIFP. Section 58(1A) imposes upon a specified person liability only in respect of the taxable activities of the incapacitated person concerned, and not in respect of the taxable activities of some other person registered in respect of those activities.

[42] On the other hand, s 57(3) is concerned with imposing liability on a partner where the partnership (itself registered for GST purposes) does not meet its GST obligations. The s 57(3) liability is not dependent upon or related to the carrying on by partners of their own taxable activities. The subsection simply imposes statutory liability for the GST responsibilities of another (registered) entity.

[43] Mr Goddard's third argument would have the receivers deemed to be members of the partnership for the purposes of s 57(3) because they have, in effect, stepped into the shoes of the partners and so are to be taken as jointly and severally liable for the partnership's tax liabilities. But it is by no means clear how the receivers may be said to have stepped into the partners' shoes for GST purposes.

[44] Although the definition of the term "member" in s 2(1) is not a closed definition, the Court would not, in my view, be justified in extending it to a receiver, given that the legislature has seen fit to specify four categories of legal person who come within that definition. There is no compelling reason to stretch the language of the definition beyond its specified scope. The argument for doing so appears to be based upon the proposition that the partners (through the receivers) were "participating in the partnership's affairs" when selling the CNIFP assets. But their participation cannot of itself amount to a taxable activity. I have already rejected that contention. There is nothing in the scheme of the Act that suggests it would be proper to accede to Mr Goddard's argument.

[45] A further and rather more practical objection to the argument concerns the role of a receiver for a partner. Although there were here just two partners, Mr Goddard's argument must logically extend to any case in which one of a number of partners goes into receivership. In such cases the receiver would be deemed to be jointly and severally liable with other partners for the GST liability arising from a taxable activity even though the receiver concerned might be powerless to influence other partners in respect of the undertaking of the transaction. In other words, receivers, simply by virtue of their status, may become personally liable for substantial GST liabilities where they have no practical ability to play an effective role in the transaction giving rise to that liability. Of course the position is quite different in respect of receivers for the partnership itself. In such circumstances the

receivers have full control over the taxable activities of the partnership and it is not inappropriate that they also bear personal liability for those activities.

[46] For these reasons I am not persuaded that the receivers did assume personal liability for the GST with which this case is concerned. They were therefore mistaken in concluding that they were (or might be) so liable when they paid the amount of the GST to the Commissioner.

[47] That conclusion simply reflects the view I take of the relevant provisions of the Act, which requires no gloss in order to achieve an appropriate practical outcome. Although I consider that the receivers were not liable for the GST arising on the sale, the partnership and the partners remain liable. Their impecuniosity is simply a fact of life insofar as the Commissioner is concerned. Considerations of equity or fairness have little or no weight in a tax case.[18]

[48] By reason of the receivers' mistake, it is necessary to turn to a consideration of the remaining issues arising in respect of the present strike-out application.

Section 95 of the PPSA

[49] If (as I have held) the receivers had no personal liability for the GST obligations of the CNIFP, the plaintiffs seek relief in the proceeding in reliance on broad restitutionary principles. But before that aspect of the proceeding can be considered, it is necessary to deal with the Commissioner's argument that s 95 of the PPSA constitutes a complete answer to the plaintiffs' claims.

[50] Section 95 provides:

> **95 Priority of creditor who receives payment of debt**
>
> (1) A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest in—
>
> (a) The funds paid:

[18] *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd* at [27]; see also the comments of the Privy Council in *Edgewater Motel Ltd v Commissioner of Inland Revenue* (2004) 21 NZTC 18,664 (PC) at [9]-[10].

(b) The intangible that was the source of the payment:

(c) A negotiable instrument used to effect the payment.

(2) Subsection (1) applies whether or not the creditor had knowledge of the security interest at the time of the payment.

(3) In subsection (1), debtor-initiated payment means a payment made by the debtor through the use of—

(a) A negotiable instrument; or

(b) An electronic funds transfer; or

(c) A debit, a transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

[51] The Commissioner's argument, in a nutshell, is that he was a creditor of the CNIFP who received payment of the GST amount owing by the CNIFP by means of a negotiable instrument, pursuant to a debtor-initiated payment as defined in s 95(3). Accordingly, by virtue of s 95(1), the Commissioner asserts priority over the security interests of CNI Nominees and the BNZ in the funds paid and in the bank account (an intangible) that was the source of the payment. The Commissioner further says that notices of protest and of claims to a prior security interest in respect of the funds are irrelevant by reason of s 95(2).

[52] The intended effect of s 95 is summarised in Gedye, Cuming and Wood:[19]

> Section 95 ensures that when the debtor makes a payment to a creditor by one of the specified mechanisms, the creditor need not be concerned that the payment is subject to a prior claim by a secured party who has a security interest in the property from which the payment is made.

[53] To similar effect is the explanation appearing in Widdup and Mayne,[20] where it is said that:

> A creditor who receives payment of a debt, owing by a debtor, through a debtor-initiated payment has priority over a security interest in the funds paid, an intangible that was the source of the payment (that is, a cheque account) or a negotiable instrument used to effect the payment (that is, a

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19 Gedye, Cuming and Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at 344.

20 Widdup and Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis Butterworths, Wellington, 2002) at [14.16].

> cheque).[21] This enables the debtor to use funds, which are subject to a broadly based security interest, to pay creditors in the ordinary course of business. The purpose of this section is to "leave money and cheques largely free from security interests to preserve the integrity of the payment system".[22] The ability of a debtor to pay creditors with assets that are subject to a security interest is similar to the debtor's ability to do so under an uncrystallised floating charge.[23] The payment must be debtor-initiated which suggests that it cannot result from a creditor demanding payment if, for example, the debtor is insolvent.

[54] Section 95 accordingly treats the payment of debts out of funds subject to a security interest in the same manner as payments by a company out of a bank account subject to an uncrystallised floating charge were treated prior to the enactment of the PPSA. But Mr Goddard submits that s 95 removes from consideration factors that might have been relevant prior to the Act, namely:

a) Whether the security had crystallised (a concept which does not survive under the PPSA).

b) Whether the payment was made in the ordinary course of business.

c) Whether the recipient of the payment had notice of crystallisation, or notice that a payment had been made in breach of the terms of the floating charge.

[55] Mr Goddard further submits that in using the term "debtor-initiated payment" Parliament must be taken to have expressly addressed the criteria that must be met for a payment to qualify as a "debtor-initiated payment", so that concepts of the "ordinary course of business" or "voluntariness" must be assumed to have been deliberately excluded. Otherwise, he argues, provision for them would have been made in s 95(3). Instead, he maintains, the true inquiry must be as to whether the payment was made at the instigation of a debtor. The necessary assessment must take into account the plain purpose of s 95, which is to enable creditors to rely on the validity of payments received from a debtor without needing to inquire into the existence of possible security interests in the funds out of which the payment was

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21 Section 95.

22 *Flexi-coil Ltd v Kindersley District Credit Union Ltd* (1993) 107 DLR (4th) 148.

23 Cuming and Wood *British Columbia Personal Property Security Act Handbook* (4th ed, Carswell, Toronto, 1998) at 227.

made; where the payment is in truth a creditor-initiated payment resulting from the enforcement of security interests, the usual priority rules will apply.

[56] Mr Goddard is critical of the suggestion in Widdup and Mayne[24] that the term "debtor-initiated payment" suggests that a payment made by reason of creditor demands might not amount to a "debtor-initiated payment" for the purposes of s 95. He argues that such an approach is not supported by either the language or policy of s 95.

[57] Mr Simpson, on the other hand, submits that to regard s 95 as conclusive of priorities in cases such as the present would be to produce a number of anomalous and unintended consequences; the Commissioner's approach conflicts, in particular, with:

a) The established order of creditor claims prescribed by the PPSA, the Receiverships Act 1993 and Schedule 7 of the Companies Act 1993.

b) The principle that all creditors of the same class should be treated on an equal footing (ranking *pari passu*).[25]

c) The voidable preference provisions in Part 16 of the Companies Act 1993 and sub-part 7 of the Insolvency Act 2006 which proscribe preferences arising from transactions entered into by creditors with insolvent debtors.

[58] Moreover, Mr Simpson submits, the legislature could not have intended to defeat claims for recovery based on equitable principles — for example, those involving knowing receipt or justifying the imposition of a constructive trust.

[59] It is, in my opinion, evident that s 95 was enacted in order to replicate the earlier entitlement of a debtor to pay its creditors where there existed an uncrystallised floating charge over the assets of the debtor. Without a provision such

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[24] At [14.16].

[25] *Attorney-General v McMillan & Lockwood Ltd* [1991] 1 NZLR 53 (CA) at 58.

as s 95, it would be difficult for persons to carry on business in situations where a broadly based security interest existed.

[60] But I do not detect in s 95 or elsewhere in the Act a legislative intention to exclude the application of over-arching legal principles, for example the cases of knowing receipt or those raising constructive trust considerations, referred to by Mr Simpson. One could legitimately add payments involving fraud or made by mistake (as to which see below).

[61] Moreover, there appears to be no discernible policy reason why cases falling within s 95 should enjoy the sort of absolute protection for which Mr Goddard contends. The section does not, for example, apply to payments made by way of set-off, or to negotiable instruments drawn by third parties and endorsed by the debtor in favour of the creditor, or to a simple accounting entry in a book of account.

[62] The purpose of s 95 is, in my opinion, to facilitate ordinary trade and commerce by ensuring that a creditor who receives payment of a debt in the manner stipulated by s 95(3) takes priority over any security interests in the funds so paid, the intangibles that were the source of the payment, and the negotiable instrument itself. Such priority arises whether or not the creditor had knowledge of the security interest at the time of payment. But there is nothing in the section which expressly or by implication excludes the right of an affected party to impugn the payment on independent grounds The section is simply concerned with the circumstances in which a debtor-initiated payment takes priority over any relevant security interest.

[63] Here, the plaintiffs do not bring the proceeding in the context of a claimed security interest in the cheque itself or the proceeds of that cheque but, rather, bring an *in personam* claim against the Commissioner on the basis that he has received a payment made under a mistake, in circumstances where the plaintiffs have a claim for return of the money.

[64] While I accept that s 95 operates to protect a creditor from a proprietary claim to a negotiable instrument falling within the section, as against the holder of a

relevant security interest, a claim *in personam* does not conflict with the creditor's rights in a negotiable instrument.

[65] Cuming and Wood[26] observe, when dealing with the equivalent provision in the template Saskatchewan legislation, that *in personam* claims are preserved, for example, by the continuing availability of an action at common law to account for money had and received.

[66] In concluding that an action for money had and received is not precluded by the provisions of s 95, I have had regard to the broad policy of the Act and the need for it to be aligned, so far as is possible, with the general law.[27]

[67] Accordingly I hold that s 95 does not, simply by its existence, rule out the plaintiffs' claim.

[68] But, in case I am wrong on that point and because the matter may go further, I turn to the plaintiffs' alternative contention, which is that in any event the receivers' payment was not a "debtor-initiated payment" for the purposes of s 95.

[69] Mr Simpson argues that the payment does not fall within the section because:

a) FCNZ and CITIC were in receivership and the receivers therefore had control of the CNIFP.

b) The GST amount was paid from the sale proceeds of the forestry business of that partnership and was not therefore made in the ordinary course of business.

c) The payment was made by reason of compulsion or pressure created by substantial and accumulating exposure to statutory penalties that would be imposed if the GST amount was not paid on time.

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26 Cuming and Wood *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, Toronto 1994) at 244-245.

27 *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [44]; *Commerce Commission v Carter Holt Harvey Ltd* [2009] 3 NZLR 573 at [24].

d) In consequence, the payment made by the receivers was contrary to the priorities established by Schedule 7 of the Companies Act 1994 and s 30 of the Receiverships Act 1993.

e) Payment of the GST amount was made under protest by CNI Forest Nominees and the BNZ and, further, the relevant GST return was the subject of a challenge by the receivers by means of a NOPA filed within the statutory time-frame established by the Tax Administration Act 1994.

[70] The Court is told that non-payment of the GST on the due date would have given rise to very substantial penalties amounting to something over $6 million within seven days and to more than $15 million within a year. The receivers were advised that they were or might be personally liable for the GST and for any penalties for non-payment.

[71] The predicament of the receivers was particularly acute, Mr Simpson contends. If they did not make the payment on time they were exposed to the real risk of ruinous interest charges and penalties. In effect, they made the payment under compulsion. The situation was similar, Mr Simpson argues, to that outlined by Lord Goff in *Woolwich Equitable Building Society v Inland Revenue Commissioners*:[28]

> Take the present case. The revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and has to decide what to do. It is faced with the revenue armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation.

[72] I am told that this important question remains free of authority. Widdup and Mayne[29] express the view that the term "debtor-initiated payment" suggests that the payment cannot result from a creditor demanding payment where, for example, the

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[28] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 171.

[29] At [14.16].

debtor is insolvent. But there is no such suggestion in Gedye, Cuming and Wood. Questions relating to the ordinary course of business, crystallisation of floating charges and creditor notice all formed part of the former law but are not, in my view, relevant to the application of s 95. Former common law concepts are not to be imported into the construction of the PPSA save where they are consistent with the scheme of the new legislation.[30] There is nothing in the language or purpose of s 95 which requires that a gloss be placed on the meaning of the term "debtor-initiated payment". There can be no question here but that the payment was initiated by or on behalf of the debtor in the sense that a conscious decision was taken by the receivers to forward a cheque to the Commissioner for the amount of the GST liability. The fact that they did so because they believed that they were or might be personally liable for the amount of the GST concerned could not justify the conclusion that the payment was otherwise than debtor-initiated. Although the payment was made for motives associated with the sanctions for late payment imposed by the relevant statutory tax regime, it could not be said that the payment thereby lost its debtor-initiated status. The Commissioner did nothing at all. He simply administered the Act under which the receivers decided, for understandable reasons of their own, to make payment.

[73] The language and obvious purpose of s 95 are inconsistent with an approach to a construction of the term "debtor-initiated payment" which would leave room for a detailed examination of the motives of the payer in given cases. For example, it could be argued that no payment made in the context of a default interest provision would be debtor-initiated, even though the payment was entirely voluntary in the sense that it was made in the absence of any communication from the creditor. I consider, therefore, that the payment of GST made by the receivers was a debtor-initiated payment for the purposes of s 95 of the PPSA. But, as earlier concluded, s 95 is not itself a bar to the present proceeding.

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30 *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at [69]–[76].

The claim for money had and received

[74] Following the first day of the hearing on 31 August 2009, the plaintiffs filed and served a draft third amended statement of claim dated 17 September 2009. The plaintiffs relied upon this pleading at the subsequent hearing on 17 May 2010.

[75] The draft third amended statement of claim pleads two causes of action. The first, by the receivers alone, invokes the challenge procedures laid down by the Tax Administration Act 1994, and seeks a declaration that the receivers are not liable for GST in respect of the sale, together with consequential relief.

[76] I have dealt with that issue earlier.

[77] The second cause of action is pleaded by all plaintiffs and seeks relief based upon an alleged mistake made by the receivers as to their liability for GST. Paragraphs 5.1-5.2 of the draft third amended statement of claim read:

> 5.1 When making the following decisions and taking the following actions, the CNIFP was controlled by the First Plaintiffs in their capacity as members of the CNIFP's management board and as receivers of the partners, FCNZ and CITIC:
>
> (a) entering into the Deed of Application of Sale Proceeds;
>
> (b) allowing the First Plaintiffs to use a portion of the proceeds from the sale to pay the GST amount to the Commissioner in satisfaction of the liability the First Plaintiffs mistakenly believed they had for GST output tax in respect of the sale;
>
> (c) in the alternative, should the Court find that the CNIFP, and not the First Plaintiffs, filed the GST return and paid the GST amount to satisfy any liability of the First Plaintiffs for the GST output tax, then when taking those actions.
>
> 5.2 When the First Plaintiffs made the decisions and took the actions referred to in paragraphs 3.7 and 3.8, and when CNIFP made the decisions and took the actions referred to in paragraph 5.1, they made the following mistakes:
>
> (a) They mistakenly assumed that the First Plaintiffs had a liability to pay the GST output tax in respect of the sale;
>
> (b) As a consequence, they mistakenly concluded that the liability for the GST amount was a cost of receivership, and

therefore a priority claim on the CNIFP assets and proceeds of sale of those assets that ranked ahead of the Senior Debt and the Junior Debt under the terms of the Senior Debenture and the Junior Debenture;

(c) They mistakenly concluded that the First Plaintiffs and/or the CNIFP were required by law to pay the GST amount to the Commissioner in priority to the Senior Debt and the Junior Debt.

[78] The plaintiffs then plead that the Commissioner cannot in good faith retain the GST amount in priority to the Senior Debt and the Junior Debt, and that he is obliged to refund the GST amount either:

a) to the receivers if the Court finds that they paid the GST, on the ground that it is money had and received under a mistake by the receivers and the CNIFP without the provision of consideration from the Commissioner to the receivers and with knowledge of the competing claims by the BNZ and CNI Nominees; or

b) to the BNZ and CNI Nominees as security trustees if the Court finds the CNIFP paid the GST amount, on the ground that it is money had and received under a mistake by the CNIFP and with knowledge of the competing claims by the BNZ and CNI Nominees.

[79] The plaintiffs' prayer for relief in respect of the second cause of action seeks:

a) A declaration that the First Plaintiffs are not liable to the Commissioner for the GST output tax in respect of the sale;

b) A declaration that the BNZ and CNI Nominees as the Senior and Junior Security Trustees have prior entitlement to some or all of the proceeds from the sale of the CNIFP assets ahead of the Commissioner's claim for GST, and defining the extent of that prior entitlement;

c) If the Court finds that the First Plaintiffs paid the GST amount to the Commissioner, an order directing the Commissioner to repay to the

First Plaintiffs the GST amount to the extent of the BNZ and CNI Nominees' prior entitlement, plus interest on that amount at the rate of 7.5% p.a. from the date of payment until the date of judgment;

d) In the alternative, if the Court finds that the CNIFP paid the GST amount to the Commissioner, an order directing the Commissioner to pay the GST amount to the BNZ and CNI Nominees to the extent of their prior entitlement, plus interest on that amount at the rate of 7.5% p.a. from the date of payment until the date of judgment; and

e) Costs.

[80] As is appropriate in the context of strike-out application, the parties have filed only limited affidavit evidence from which the following factual features emerge.

[81] The sale of the forest assets was settled on 10 October 2003 by a Deed of Application of Sale Proceeds dated that same day and made between the BNZ and the receivers. It was agree that the receivers would retain the GST amount to be paid to the Commissioner.

[82] On 19 December 2003, Fletcher Challenge Forest Finance Limited wrote to the receivers protesting the payment of the GST amount to the Department of Inland Revenue. A copy of this letter was sent to the Commissioner. The letter (from Bell Gully) reads:

> **Protest to payment of GST to Inland Revenue Department on proceeds of sale of forest and processing assets by Forest Corporation of New Zealand Limited (In Receivership), CITIC New Zealand Limited (BVI) In Receivership, Red Stag Mouldings Limited (In Recollection).**
>
> We act for Fletcher Forests Limited and its subsidiaries, Fletcher Challenge Forests Finance Limited and CNI Forests Nominees limited. Our clients have received notice from the receivers of the CNIF Partners that the CNIF Partners have settled or are about to settle the following sale agreements (**Sale Agreements**):
>
> 1. An agreement by Forest Corporation of New Zealand Limited (in receivership) and CITIC New Zealand limited (BVI) (in receivership) to

sell their interests in the Central North Island forest estate (or part of it) to the KT Partnership.

2. An agreement by Red Stag Mouldings Limited (in receivership) to sell its interests in the freehold property and processing plant of 14 Te Maria Street, Mt Maunganui to J E Harman or nominee.

3. An agreement by Red Stag Wood Products Limited (in receivership) to sell the freehold property and processing plant at Waipa to Waipa Corporation Limited.

We do not know what arrangements have been agreed between the parties to the Sale Agreements in respect of the payment of GST on the sale.

However, assuming that the sale prices payable under the Sale Agreements are subject to GST, we wish to record the interest of CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited in the gross proceeds of sale to the extent that they exceed the amount payable to lenders whose loans to the CNIF Partners are secured by first ranking debenture and mortgage securities held by the BNZ as security trustee. CNI Forests Nominees Limited holds second ranking debenture and mortgage securities over these assets as security trustee for Fletcher Challenge Forests Finance Limited, to secure advances and other financial accommodation made by Fletcher Challenge Forests Finance Limited to the CNIF Partners.

If any payment from the proceeds of sale is made to the Inland Revenue Department, then that payment is made under protest by CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited. This protest is made on the basis that CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited have priority to these moneys (or an appropriate part of them) ahead of the Inland Revenue Department's entitlement to GST on the price payable under the Sale Agreements. In acknowledging that such a payment has been, or may be made to the Inland Revenue Department, CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited do not acknowledge the right of the Inland Revenue Department to be entitled to keep such money. CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited reserve their rights to bring a claim against the Inland Revenue Department to recover all, or the appropriate part, of such payment.

Yours faithfully
Bell Gully.

[83] On 29 January 2004, the BNZ wrote to the Commissioner supporting the protest notified in the letter of 19 December 2003. The Bank's letter reads:

GST ON PROCEEDS OF SALE OF FOREST AND PROCESSING ASSETS OF CNI FOREST PARTNERSHIP

We refer to enclosed facsimile to you from Bell Gully dated 19 December 2003, which was sent on behalf of Fletcher Forests Limited and its subsidiaries. Please note that Bank of New Zealand was the holder of first

> ranking security over the assets referred to in the Sale Agreements in Bell Gully's facsimile.
>
> Bank of New Zealand asserts a similar, but prior, interest to that of CNI Forests Nominees Limited and Fletcher Challenge Forests Finance Limited in the gross proceeds of sale, to the intent that Bank of New Zealand has priority ahead of the Inland Revenue Department to GST on the price payable under the Sale Agreements to the extent of monies remaining owing to Bank of New Zealand as Security Trustee.
>
> Accordingly, any payment of GST to the IRD by the receivers of the CNI Forest Partners or their subsidiaries is to be treated as one being made under protest by Bank of New Zealand and the Bank reserves its rights to bring a claim to recover all or the appropriate part of the GST payment.

[84] By reason of the receivers' predicament earlier discussed, they determined that the proper course was to make payment of the amount of the outstanding GST. That occurred on 29 January 2004 and was accompanied by a GST return. The amount of the cheque was $123,416,346.20, a figure reached after the making of certain adjustments. The amount of GST actually owing in respect of the relevant asset sale was $127,530,641.96. A cheque for the former figure was drawn on the account of "Central North Island Forestry Partnership (receiver's a/c)".

[85] Before considering the competing arguments of counsel, I turn to consider the relevant legal principles, as to which there is little dispute.

[86] The law relating to the recovery of payments made under a mistake has developed over a considerable period, but the classic and indeed seminal judgment is that of Robert Goff J (as he then was) in *Barclays Bank Ltd v W J Simms Ltd*.[31] The pivotal passage in that judgment appears at 695-696:

> From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.

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[31] *Barclays Bank Ltd v W J Simms Ltd* [1980] 1 QB 677.

To these simple propositions, I append the following footnotes: (a) **Proposition 1**. This is founded upon the speeches in the three cases in the House of Lords, to which I have referred. It is also consistent with the opinion expressed by Turner J. in *Thomas v. Houston Corbett & Co*. [1969] N.Z.L.R. 151, 167. Of course, if the money was due under a contract between the payer and the payee, there can be no recovery on this ground unless the contract itself is held void for mistake (as in *Norwich Union Fire Insurance Society Ltd. v. Wm. H. Price Ltd.* [1934] A.C. 455) or is rescinded by the plaintiff.

(b) **Proposition 2 (a)**. This is founded upon the dictum of Parke B. in *Kelly v. Solari* 9 M. & W. 54. I have felt it necessary to add the words "or is deemed in law so to intend" to accommodate the decision of the Court of Appeal in *Morgan v. Ashcroft* [1938] 1 K.B. 49, a case strongly relied upon by the defendants in the present case, the effect of which I shall have to consider later in this judgment.

(c) **Proposition 2 (b)**. This is founded upon the decision in *Aiken v. Short*, 1 H. & N. 210, and upon dicta in *Kerrison v. Glyn, Mills, Currie & Co.*, 81 L. J.K.B. 465. However, even if the payee has given consideration for the payment, for example by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorised to discharge it, that transaction may itself be set aside (and so provide no defence to the claim) if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith: cf. *Ward & Co. v. Wallis* [1900] 1 Q.B. 675, 678-679, per Kennedy J.

(d) **Proposition 2 (c)**. This is founded upon the statement of principle of Lord Loreburn L.C. in *Kleinwort, Sons & Co. v. Dunlop Rubber Co*., 97 L.T. 263. I have deliberately stated this defence in broad terms, making no reference to the question whether it is dependent upon a breach of duty by the plaintiff or a representation by him independent of the payment, because these matters do not arise for decision in the present case. I have however referred to the possibility that the defendant may be deemed in law to have changed his position, because of a line of authorities concerned with negotiable instruments which I shall have to consider later in this judgment, of which the leading case is *Cocks v. Masterman* 9 B. & C. 902.

(e) I have ignored, in stating the principle of recovery, defences of general application in the law of restitution, for example where public policy precludes restitution.

(f) The following propositions are inconsistent with the simple principle of recovery established in the authorities: (i) That to ground recovery, the mistake must have induced the payer to believe that he was liable to pay the money to the payee or his principal. (ii) That to ground recovery, the mistake must have been "as between" the payer and the payee. Rejection of this test has led to its reformulation (notably by Asquith J. in *Weld-Blundell v. Synott* [1940] 2 K.B. 107 and by Windeyer J. in *Porter v. Latec Finance (Qld.) Pty. Ltd* (1964) 111 C.L.R. 177, 204) in terms which in my judgment mean no more than that the mistake must have caused the payment.

[87] The starting point is, therefore, that a person who pays money to another under a mistake of fact which causes him to make the payment is *prima facie* entitled to recover it. The principle applies equally to a mistake of law: see the judgment of Lord Goff (as he had by then become) in *Kleinwort Benson Ltd v Lincoln City Council*.[32]

[88] In general the Court will apply a simple "but for" test for causation: would the payment have been made but for the payer's mistake?[33]

[89] Mr Goddard does not take issue with any of these legal principles and indeed expressly accepts that a mistake as to priorities may constitute a relevant mistake of law for present purposes. But he says that the plaintiffs' claim must fail because it falls within the second of the exceptions referred to in *Barclays Bank*, namely, that the payment to the Commissioner was made for good consideration in that it was paid to discharge, and did discharge, a debt owed to the Commissioner by the CNIFP. I will address this submission in due course.

[90] The principal issue is whether the plaintiffs (or some of them) can recover the GST payment made to the Commissioner on the basis that it was paid under a mistake of fact or law. In determining whether the plaintiffs have demonstrated an arguable case it is necessary to consider the following questions:

a) Was there an actionable mistake of fact or law?

b) Did the Commissioner give consideration for the payment?

c) If so, did the Commissioner receive the payment in good faith?

d) If not, do the plaintiffs have standing to recover the payment?

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32 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) at 379.

33 *Barclays Bank Ltd v W J Simms Ltd* at 695; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 (HL) at 591; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (Ch) at 1272.

[91] Before turning to these questions, I address briefly a preliminary issue raised by counsel, namely whether the GST payment was made by the CNIFP or the receivers.

Who made the payment?

[92] Mr Goddard's argument is simplicity itself. He argues that as a matter of law the only person who can have made the payment out of money belonging to the CNIFP is the partnership itself. The proceeds of the sale belong to the partnership. The CNIFP was not in receivership. The receivers did not own the assets and were not entitled to them. Accordingly the receivers had no interest of any kind, legal or equitable, in the funds of the partnership. The funds of the CNIFP were paid out of its bank account to the Commissioner by agents of the partnership (who happened to be receivers of the partner companies). The fact that the receivers may have procured the CNIFP to pay its debt to the Commissioner to ensure that the receivers did not face personal liability jointly with the partnership for that debt cannot lead to the conclusion that the payment was not made in satisfaction of the CNIFP's liability. On the contrary, the purpose of the payment by the CNIFP was to satisfy the liability of the partnership so that the receivers could not be called upon to pay that amount personally.

[93] Accordingly, the payment was made in order to discharge the CNIFP's debt to the Commissioner, who gave good consideration for the payment. The case therefore falls within an established exception to the right to recover a payment made under a mistake.

[94] The argument for the plaintiffs is somewhat more elaborate.

[95] By virtue of ss 30 and 32 of the Receiverships Act 1993 and of the various security documents by which the plaintiffs are bound, the receivers are required to apply the proceeds of sale of the CNIFP assets in a fixed order of priority. The first call upon those assets is to be made by the receivers themselves in order to secure payment of the costs of the receivership. GST (if the receivers incurred a personal

liability for payment) is an expense, which is therefore accorded priority.[34] Thereafter the proceeds must be applied in payment of secured creditors, then preferential creditors and, lastly, unsecured creditors.

[96] If the receivers were personally liable for GST then the Commissioner should be paid in priority to the secured creditors, the GST payment being a receivership cost. If the receivers were not so liable then the Commissioner's entitlement would be postponed until after all secured creditors were paid. Because there was a deficiency in respect of secured creditors there would be no payment to lower ranked creditors, including the Commissioner.

[97] In the light of advice that they were (or might be) personally liable for GST, the receivers paid the Commissioner the amount of the GST as an expense of the receivership. But, Mr Simpson argues, they did not do so in order to discharge the liability of the CNIFP to the Commissioner. Rather, the payment was made in order to discharge the receivers' personal liability. They were entitled to do that by virtue of the powers conferred on them by the security documents executed by the partners who owned the CNIFP assets. The GST payment was, therefore, made by the receivers pursuant to their contractual right to be indemnified out of the charged assets (the partners being the owners of the equity of redemption in those assets) for the purpose of satisfying the receivers' assumed personal liability for GST.

[98] Accordingly, Mr Simpson argues, the receivers made the payment out of funds to which they were entitled to have recourse in order to discharge their own personal liability for the GST. If they had not believed themselves to be under such personal liability the payment would not have been made. Mr Simpson strongly disputes Mr Goddard's proposition that it was legally impossible for payment to the Commissioner to have been made by any entity other than the partnership. The proper analysis, Mr Simpson contends, is that the payment was made by the receivers utilising funds to which they were entitled to have recourse for the purpose

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[34] *Peace and Glory Society Ltd (in liq) v Samsa* [2010] 2 NZLR 57 (CA) at [74].

of satisfying their liability.[35] In those circumstances the payment cannot properly be said to have been made by the CNIFP from its own funds.

[99] This issue is relevant for two quite different reasons. First, it bears on the question of whether the Commissioner gave consideration for the payment by accepting it in satisfaction of the CNIFP's liability to the Commissioner for GST. If he did give consideration in that way, then on the *Barclay's Bank* analysis, an argument based on the law of mistake might not be open to the plaintiffs.

[100] The issue is relevant also, on Mr Goddard's argument, to the question of standing. He maintains that because the payment must be deemed to be a payment made by the CNIFP in respect of its own GST liability, neither the receivers nor the individual partners have standing to maintain a claim against the Commissioner. On his analysis Mr Goddard contends that only CNI Forest Nominees and the BNZ can demonstrate standing, because only they are able to lay claim to the payment if they can show that as a matter of priorities they are entitled to the payment made by the CNIFP to the Commissioner.

[101] The standing point is considered below.

[102] The first of the two issues is concerned with whether the Commissioner gave consideration. He will have done so if the payment was intended to discharge a tax liability owed to the Commissioner. The analysis must turn on the intention of the party making the payment, to be assessed in the light of that party's knowledge of the legal effect of that payment. A partnership may act only through the agency of those controlling it, in this case the board, of which the receivers happened to be the only members. The intention of the receivers was accordingly the intention of the partnership. It was known that there was a shortfall in available funds, and that the debt owed to the Commissioner in respect of GST could not be paid without disturbing the priorities established by the various security documents.

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[35] The receivers were entitled to recoup the costs of the receivership even though they were not receivers of the partnership as such, by virtue of clause 11 of an inter-creditor agreement dated 16 December 1998.

[103] But a payment was nevertheless made because the partnership, like the receivers, understood the receivers to be personally liable to the Commissioner for the very same GST debt. The CNIFP therefore (acting by its board) applied its funds in the payment of that debt. That step was thought to be lawfully available because, if the receivers were also liable, the GST payment was a receivership cost which the security documents permitted to be paid in priority to the sums owed to the secured creditors. In doing so, the CNIFP permitted its assets to be used for the purpose of discharging its own GST obligations to the Commissioner.

[104] In my opinion the payment cannot properly be analysed in any other way. The receivers (and through them the CNIFP) mistakenly thought that the receivers themselves were personally liable to the Commissioner. That was the reason for the GST payment. There was never more than one GST debt, which was the principal responsibility of the CNIFP, but was also a sum for which the receivers thought they were liable.

[105] Accordingly, the payment made to the Commissioner must have been a payment made in order to discharge the single GST debt owed to him. The fact that the debt was paid only because the receivers mistakenly thought that they were also liable for the same debt, is logically irrelevant. In other words, at this point of the analysis, it is not permissible to take the motive of the payer into account.

[106] It follows therefore that the payment was made in order to discharge a debt owing to the Commissioner. In that sense the Commissioner must be regarded as having provided consideration. However, as appears below, I do not regard that conclusion as necessarily determinative of the plaintiffs' claim.

Was there an actionable mistake of fact or law?

[107] The circumstances in which a payment made by reason of a mistake of law may be recovered have been the subject of recent consideration in the House of Lords. The relevant principles might be thought to be in a state of development.

[108] In *Kleinwort Benson Ltd v Lincoln City Council*, the plaintiff bank entered into interest rate swap agreements with four local authorities. After the transactions had been fully performed, a decision of the House of Lords[36] held that interest swap agreements by local authorities were ultra vires. Based on that decision, the bank brought proceedings to recover payments made to the local authorities.

[109] The House of Lords upheld the bank's claim in restitution on the basis that the bank's mistaken belief that the interest rate swap agreements were legally binding disclosed a cause of action in mistake. Lord Goff held at 379:

> To me, it is plain that the money was indeed paid over under a mistake, the mistake being a mistake of law. The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it.

[110] More recently the House of Lords affirmed this approach in *Deutsche Morgan*:[37]

> So the main question in the *Kleinwort Benson* case [1999] 2 AC 349 was whether a person whose understanding of the law (however reasonable and widely shared at the time) is falsified by a subsequent decision of the courts should, for the purposes of the law of unjust enrichment, be treated as having made a mistake. The majority view in the *Kleinwort Benson* case was that he should. The effect of the later judgment is that, contrary to his opinion at the time, the money was not owing. It is therefore fair that he should recover it. It may be that this involves extending the concept of a mistake to compensate for the absence of a more general condictio indebiti and perhaps it would make objectors feel better if one said that because the law was now deemed to have been different at the relevant date, he was *deemed* to have made a mistake. But the reasoning is based upon practical considerations of fairness and not abstract juridical correctitude

[111] In *Deutsche Morgan* the claimant had made distributions in accordance with the provisions of the Income and Corporation Taxes Act 1988. A decision of the Court of Justice of the European Communities subsequently held that those provisions which concerned payments of advance corporation tax amounted to an unwarranted restriction on freedom of establishment, and that taxpayers who made payments under those provisions were entitled to recovery.

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36 *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL).

37 *Duetsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 (HL) at [23].

[112] The House of Lords upheld the claimant's argument that the effect of the Court of Justice's decision was that, prior to the decision, the claimant had been acting under a mistake, and was therefore entitled to recover payments made in consequence of that mistake. Lord Hope stated at 581:

> The essence of the principle is that it is unjust for a person to retain a benefit which he has received at the expense of another which that person did not intend him to receive because it was made under a mistake that it was due. The claimant must prove that he acted under a mistake. But the stage when he made his mistake does not matter, so long as it can be said that if he had known of the true state of the facts or of the law at the time of the payment he would not have made it. A wrong turning half way along the journey is just as capable of being treated as a relevant mistake as one that is made on the doorstep at the point of arrival.

[113] The principle that may be extracted from these two decisions is that a judgment of the courts that clarifies the law can have the effect of establishing that payers were, before the law was clarified or changed,[38] acting under a mistake of law.

[114] I have earlier in this judgment held that the receivers were not personally liable for the GST amount owing to the Commissioner. Mr Simpson's argument is that, accordingly, the receivers were acting under a mistake of law when they made the GST payment.

[115] The House of Lords' decisions are not directly analogous to the present case. In both of those cases the payer and payee thought that a debt was owing, but after judicial clarification of the state of the law, both parties accepted that a debt was not in fact owing; the issue was whether the payer could recover payments made to the payee when at the time they shared the mistaken belief that it was. The House of Lords held in both cases that they could.

[116] In this case, the issue is more complicated. Although a debt was not owing by the receivers personally, nevertheless a debt remained owing by the CNIFP. The effect of my earlier conclusion is not to discharge the debt to the Commissioner retrospectively, but to clarify the order in which creditors (including the Commissioner) were entitled to be paid. The issue is whether this clarification can

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[38] Ibid, at 570.

amount to a relevant mistake of law which caused the plaintiffs to make the payment.

[117] In my judgment it can. The payment was made because the receivers understood themselves to be under personal liability to the Commissioner for the amount of the outstanding GST. Had they known (as I have held) that they were under no such liability, then the payment would not have been made. This is because the GST payment would not have constituted a cost to the receivership, and the Commissioner would have ranked behind the security trustees in priority. So the receivers made a mistake about priorities because they wrongly believed themselves to be personally liable for the amount of the GST.

[118] Ultimately, whether a party actually acted under a mistake is a question of fact. It might be argued that the plaintiffs when making the payment were not mistaken, but merely in a state of doubt, and there is some authority for the view that a state of doubt does not amount to a mistake.[39] If one takes a risk that a debt is owed he will not necessarily be acting under a mistake. But there is support also for the view that a state of doubt is not necessarily sufficient to rule out an argument based on mistake. As Lord Hoffman observed in *Deutsche Morgan* at 571*:*

> I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt.

[119] Likewise in this case, I do not think the fact that the plaintiffs had doubts as to whether the receivers were personally liable for the GST payment is determinative of the question of whether they were acting under a mistake.

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[39] Ibid, at 570.

[120] I have earlier held that the GST payment was made by the partnership, and not by the receivers. However, in my view, the central question is not as to who made the payment, but whether the party who made it was acting under a relevant mistake. The CNIFP made the payment because it (and the receivers) believed if the payment was not made, the receivers would be personally liable for it. It turns out that the receivers were not personally liable. Hence, the payer was acting under a mistake.

[121] Mr Goddard submits that because the CNIFP made the payment out of its own funds, there is no room for an argument resting upon a mistake made by the receivers, who were not, after all, receivers of the CNIFP.

[122] This submission is, I think, answered by paragraph (f) of Robert Goff J's exposition in *Barclays Bank*.[40] It is not necessary for the mistake to have been "as between the payer and the payee". The question is whether the mistake *caused* the payment. In this case the answer is that it did. The receivers (acting in their capacity as the two members of the Board of the CNIFP) would not have caused the CNIFP to make the payment but for their belief that they (in their capacity as receivers of the partners) needed to be relieved of personal liability for the same debt.

Did the Commissioner give consideration for the payment?

[123] An exception to recoverability identified by Goff J (as he then was) in *Barclays Bank* (proposition 2(b)) concerns cases where consideration has been given as, for example where the payment is accepted in discharge of a debt owed to the payee. The exception rests chiefly upon the decision in *Aiken v Short*.[41] There the bank took an equitable mortgage over an inheritance to which a customer was supposedly entitled. On the instructions of that customer, the bank discharged a debt owed by the customer to the defendant. It transpired the customer had no entitlement to an inheritance. The bank sued the defendant for recovery of the money so paid, on the basis it had been paid under a mistake of fact. The Court of Exchequer held that the money was in such circumstances irrecoverable.

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40 At 696.

41 *Aiken v Short* (1856) 1 H&N 210.

[124] In *Aiken v Short* the bank acted as agent for the customer. There was no question that the customer owed the debt to the defendant, and that the bank itself did not owe the debt. The bank's mistake was as between the bank and the customer. The Court held that the defendant, having given consideration by discharging the debt, could not be liable to the bank.

[125] *Aiken v Short* may be (in part) analogous to the present case. CNIFP made the payment in order to discharge its debt to the Commissioner. Its (mistaken) reason for doing so was to ensure the receivers would not be held personally liable for payment. The Commissioner gave consideration for the payment by discharging the CNIFP's indebtedness. On the *Aiken v Short* analogy, the case falls within proposition 2(b) in *Barclays Bank*, which would exclude recovery.

[126] But that finding is not conclusive in the Commissioner's favour. Proposition 2(b) in *Barclays Bank* allows the possibility of an exception to irrecoverability in cases of a payment to discharge a debt where the payment was not accepted by the payee in good faith.

[127] I turn therefore to Mr Simpson's claim that there is a tenable argument that in the unusual circumstances of this case, the Commissioner did not receive the GST payment in good faith.

Did the Commissioner receive the payment in good faith?

[128] Mr Simpson contends that, even if the Commissioner gave good consideration for the GST payment, the plaintiffs can recover it under the want of good faith proviso.

[129] It should be observed that there is an important distinguishing feature in *Aiken v Short*. There, the third party simply received a payment from the bank intended to discharge the debt owed by the bank's customer to the third party. There was nothing in the transaction to alert the third party to the claimed conditionality of the payment, or to any circumstance which might give rise to a claim for recovery of the money:[42]

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[42] Ibid, at 214.

> They [the bank] should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake.

[130] The present case is quite different. Here, the Commissioner was, by the time the GST payment was made, in receipt of express notice that there was a dispute as to the Commissioner's entitlement to GST in priority to the entitlements of the security trustees. Notice was given in the letter from Bell Gully of 19 December 2003, more than a month before the payment of GST was made.

[131] Mr Simpson submits that in order to retain the payment the Commissioner must have received it without notice of the relevant mistake. Counsel has been unable to identify any authority on the question of what "good faith" might be for the purposes of the *Barclays Bank* exception, but Mr Simpson submits that good faith in this context ought to be reconcilable with:

a) The standards recognised in other conceptually connected restitutionary defences; and

b) The meaning of that term in common law and other equitable contexts (for example, the taking of title free of equities by virtue of the purchaser's absence of notice of prior interests).

[132] The concept of good faith arises in a variety of circumstances, and can require consideration in the context of both common law and equity. For example, a purchaser who claims to have acted bona fide must show he had no notice, whether actual, constructive, or imputed, of an adverse claim.[43] The principles applicable to the resolution of competing claims discussed in the textbooks and in overseas decisions are equally applicable here.[44] The bona fide purchaser defence requires not only subjective honesty, but also an absence of notice of a competing claim.

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43 Goff and Jones *The Law of Restitution* (7th ed, Sweet and Maxwell, London, 2007) at [42–002]; Mason and Carter *Restitution Law in Australia* (2nd ed, LexisNexis Butterworths, Chatswood, 2008) at [2505]-[2506].

44 *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129 (CA) at 137; *Mercury Geotherm Ltd (in rec) v McLachlan* [2006] 1 NZLR 258 (HC) at [139]-[143].

[133] In this case I have held that the receivers were wrong in their view that they were personally liable for the amount of the CNIFP's GST liability. As it turns out, the Commissioner was also wrong. Mr Goddard having argued on his behalf that the receivers were indeed personally liable, there is something in my view to be said for Mr Simpson's submission that in such circumstances the Court must take a cautious view for strike-out purposes of the extent of the knowledge required of a payee in the context of a good faith analysis.

[134] Here, the Commissioner knew in advance that the legal basis for the receivers' payment would be challenged, and so was on notice of a claim to a prior interest. The Commissioner knew, also, that the scheme of the Tax Administration Act precluded the taking of any other practical step to obtain a ruling as to the receivers' personal liability. And of course the Commissioner shared the receivers' mistake as to the existence of that liability.

[135] In response, Mr Goddard notes that there may be some doubt as to whether an absence of good faith precludes reliance on the good consideration defence.[45] But, he says, the plaintiffs' good faith argument does not affect in any event the Commissioner's position. Mr Goddard argues that the payment could have been received in bad faith only if there was both a mistake by the partnership and knowledge on the part of the Commissioner that a mistake had been made. In this case, he says, there is no allegation in the amended pleadings that the Commissioner was aware of the receivers' view of the law before the payment was made or that the Commissioner knew that this view of the law was wrong.

[136] In summary, Mr Goddard's argument is that:

a) There is no factual basis for an allegation that the Commissioner knew of a mistake as to the personal liability of the receivers before payment was made.

b) The Commissioner has throughout considered that the receivers were in fact personally liable, jointly with the CNIFP, for GST; a shared

[45] See Goff and Jones at [4–044].

mistake about the law (if there was one) cannot establish a lack of good faith on the part of the Commissioner at the time of payment.

c) The want of good faith principle is directed to persons who know of and take advantage of another's mistake. The Commissioner is not such a person.

d) Mere receipt of notice of protest by secured parties does not establish want of good faith on the part of the Commissioner.

[137] The good faith point has been argued at some length but not, I believe, as extensively as would occur at trial. These are unusual facts. The problem for the receivers was that they understood that they were personally liable. Other than to make the payment and lodge a challenge as they did, there was no other practical solution available within the two month timeframe after which interest and penalties commenced under the Tax Administration Act. Although the Commissioner did not acknowledge any mistake, he was on notice by the time of receipt that the plaintiffs challenged the validity of the payment. There is an argument to make that in those circumstances, the Commissioner did not receive the payment *bona fide* for the purposes of the provision.

[138] The law relating to recovery of payments made under a mistake (and particularly under a mistake of law) is still evolving. Goff and Jones observe that questions about the scope of the defence of good consideration "have not been definitively answered".[46] Those questions include the good faith requirement. I recognise that questions of law will ordinarily be determined on a strike-out application — even where difficult and troublesome — but in my opinion, this unusual combination of factual and legal issues is best resolved at trial and not on the present application.

[139] In reaching that view, I have had regard to the observations of Lord Goff in *Kleinwort Benson* to the effect that in cases such as the present the law should

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[46] At [41–002].

develop incrementally, drawing precedent from comparable cases and insight from academic writing on the subject:[47]

> In my opinion, it would be most unwise for the common law, having recognised the right to recover money paid under a mistake of law on the ground of unjust enrichment, immediately to proceed to the recognition of so wide a defence as this[48] which would exclude the right of recovery in a very large proportion of cases. The proper course is surely to identify particular sets of circumstances which, as a matter of principle or policy, may lead to the conclusion that recovery should not be allowed; and in so doing to draw on the experience of the past, looking for guidance in particular from the analogous case of money paid under a mistake of fact, and also drawing upon the accumulated wisdom to be found in the writings of scholars on the law of restitution. However, before so novel and far-reaching defence as the one now proposed can be recognised, a very strong case for it has to be made out; and I can discover no evidence of a need for so wide a defence as this. In particular, experience since the recognition of the right of recovery of money paid under a mistake of law in the common law world does not appear to have revealed any such need.

[140] I am satisfied that the appropriate forum for ultimate determination of this dispute is at trial, when all of the evidence will be before the Court, and full and complete submissions can be made on the issue. For that reason, this section of the judgment has been largely confined to an outline of the competing contentions of counsel.

Do the plaintiffs have standing to recover the payment?

[141] Throughout the argument, Mr Goddard has maintained that the first three plaintiffs have no standing; only the secured creditors (the fourth and fifth plaintiffs) have arguably suffered loss and have status to sue, but their claim is, he says, met squarely by s 95 of the PPSA. I have held against the Commissioner on that point.

[142] Mr Goddard seeks to have the first three plaintiffs' names struck out under r 4.56 of the High Court Rules. He accepts that, at least in theory, they may maintain an action for declaration as to their liability, but it is of no utility to them because, even if they are right, they cannot get any substantive relief. That is because they

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47 *Kleinwort Benson Ltd v Lincoln City Council* at 385.

48 The defence being where a payment was made in settlement of an honest claim, proposed by Brennan J (later Brennan CJ) in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) at 399: "It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property."

have suffered no loss. The receivers cannot sue for the money back on the basis that they will then pay it to the security-holders.

[143] When considering an application to remove parties the Court adopts the same approach as on an application to strike-out for no cause of action.[49] It is a discretion "to be exercised sparingly but resolutely in clear cases".[50] I am guided by the principles discussed by Master Williams (as he then was) in *Business Associates Ltd v Telecom Corporation of NZ Ltd*.[51]

[144] In this proceeding I do not think that the circumstances are so clear as to justify a r 4.56 order removing the first three plaintiffs. They all have a sufficient interest in the subject matter of the proceeding to be entitled to claim, at the least, a declaration as to their legal position. I therefore decline to grant Mr Goddard's application.

The state of the pleadings

[145] Finally, Mr Goddard complains that there have now been three amendments to the statement of claim and contends that the time has come for the Court to proceed on the basis of the second amended statement of claim, which is the latest filed pleading. He refers to *Te Mata Properties Ltd v Hastings District Council*,[52] although the pleading considerations there were quite different from those raised in the current proceeding.

[146] The leading authority on whether the Court should permit a plaintiff to amend further is *Marshall Futures Ltd v Marshall*.[53] Where a plaintiff brings an argument that initially fails to articulate properly a potential cause of action, the Court may be inclined to "give the plaintiff an opportunity to amend so as to plead his tenable cause of action properly".

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49 *McKendrick Glass Manufacturing Company Ltd v Wilkinson* [1965] NZLR 717 (SC) at 718.
50 *Business Associates Ltd v Telecom Corporation of NZ Ltd* (1990) 2 PRNZ 317 (HC) at 319.
51 Ibid, at 319-321.
52 *Te Mata Vineyards v Hawkes Bay District Council* [2009] 1 NZLR 460 (CA) at [86]-[88].
53 *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 322-324.

[147] In my view, in a case which raises difficult legal concepts in a developing area of law, significant leeway ought to be accorded to a plaintiff to construct its case as accurately as possible.

[148] In the light of this judgment, the plaintiffs' claim will require significant repleading. A further (and final) statement of claim is to be filed and served within 20 working days of this judgment. Any further amended statement of defence by the defendant is to be filed and served within 20 working days thereafter. When the pleadings are complete, either party may seek a case management conference (either by telephone or face to face), or alternatively, request a fixture for the hearing of the proceeding.

[149] The draft third amended statement of claim upon which the argument proceeded included a cause of action based upon the NOPA filed by the receivers. As I understand it, the NOPA and the relevant cause of action were designed to serve as a platform upon which the receivers might argue that they were not personally liable for the GST payment. That issue has been determined in favour of the receivers in this judgment. It is unlikely therefore that the receivers will find it necessary to pursue that aspect of the proceeding.

Summary

[150] The Commissioner's application to strike out the plaintiffs' causes of action is dismissed.

[151] I have made the following findings, in relation to the first cause of action:

a) On the basis of the agreed facts, the receivers and the Commissioner were wrong in their view of the receivers' personal liability for GST. The receivers were not personally liable for the GST amount.

b) Although the payment was "debtor-initiated", s 95 of the PPSA does not bar the plaintiffs from bringing an *in personam* claim against the Commissioner for money had and received.

[152] In relation to the second cause of action I have held that:

a) The GST payment was made to the Commissioner by the CNIFP, and not by the receivers personally.

b) The plaintiffs have established a tenable argument that the payment was made under a relevant mistake of law as to the priority order of creditors.

c) The Commissioner gave consideration for the payment by discharging the CNIFP's liability for GST.

d) There is a tenable argument that in the circumstances the Commissioner did not receive the payment in good faith.

[153] In my view the better course is to leave for trial the ultimate resolution of the second cause of action in the light of my findings on the first cause of action. I am satisfied that the plaintiffs (or at least some of them) have an arguable case for recovery of the payment to the Commissioner.

Costs

[154] Costs are reserved. Counsel may file memoranda if they are unable to agree.

C J Allan J